No. 3814

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ELUY MILLICH, alias CHARLES MILLER, and JOHN ENGBLAD,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

ARTHUR G. SHOUP,

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Neal, Stratford & Kerr [illegible]

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STATEMENT.

The evidence in this case is that two young men, Richard H. Gleason and J. O'Brien (Gleason being a United States soldier in uniform) on the 9th day of December, 1920, entered an establishment known as the Alaskan Cafe in the town of Juneau, Alaska. While there, Gleason and O'Brien purchased several drinks of intoxicating liquor, supposed to be whiskey, and which Gleason testified was whiskey, to his belief and knowledge, and which he swore was intoxicating (Tr. p. 11). Gleason also testified that said intoxicating liquor was kept by defendants behind the bar in said establishment (Tr. p. 12).

For such intoxicating liquor they paid fifty cents a drink, served in small whiskey glasses (Tr. p. 18).

Gleason testified that he also purchased a small bottle containing about one-half pint of said whiskey, for which he paid $3.50 (Tr. pp. 12 and 13). Gerald O. Dwyer, a witness for the defense, testified (Tr. pp. 34 and 35) that at said time he saw the witness Gleason in said Alaskan Cafe, leaning against the bar in an intoxicated condition.

James McCloskey, proprietor of the Alaskan Hotel, another witness for the defense, testified (Tr. pp. 36 and 37) that Gleason invited him to go from the hotel lobby to the room conducted by the defendants and have a drink. McCloskey testified that Gleason was intoxicated. McCloskey says he took a cigar but he did not know what Gleason took.

ARGUMENT.

Counsel for plaintiffs in error divides the errors assigned by them into two heads as follows:

First—Was it error to overrule the demurrer of the defendants' to Count Three of the indictment charging a crime under the revenue act and to overrule the defendants' motion for a directed verdict, and their motions for judgment notwithstanding the verdict on said Count?

Second—Was the evidence as to Count One of the indictment herein sufficient or was the verdict on

Count One repugnant or inconsistent with the verdict on Counts Two and Four?

Counsel insists that Sec. 3242 U. S. R. S. was repealed by the Volstead Act. Disregarding other citations of counsel for plaintiff in error, I submit that this proposition was settled by the Supreme Court in the case of *U. S. v. Yuginovich et al*, 254 U. S. . . . ., 41 S. Ct. 551, 65 L. Ed. . . . . (decided June 1, 1921). That decision held that the Volstead Act repealed provisions of the Internal Revenue Law, such as Section 3242 R. S., only to the extent of the inconsistencies and reduced the penalties imposed by the Internal Revenue Law to the penalties fixed by the Volstead Act. Section 29 of the Volstead Act provides as follows:

> "Sec. 29. Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.
>
> "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than

ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officers to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person for manufacturing non-intoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar."

Section 3242 R. S. provides:

"Every person who carries on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, or manufacturer of stills, without having paid the special tax as required by law, shall, for every offense, be fined not less than one thousand dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years."

In the case at bar, the defendants were each fined in the sum of $800, and sentenced to be confined in the United States Federal Jail at Juneau, Alaska, for a period of three months as to each of the counts of the indictment upon which they were found guilty. It may therefore be that the penalty as to Count Three of the indictment should be reduced to the extent of remitting the jail sentence as there

is no provision for the imposition of a fine and jail sentence both for a first offense under the Volstead Act.

> "The appellate court in affirming a conviction may modify the punishment imposed by the trial court by mitigating, reducing, or otherwise changing it so far as it exceeds the limits prescribed by the statute. This rule applies to a fine or a sentence to a term of imprisonment in excess of that permitted by a statute; to a fine rendered against defendants jointly; to a sentence on a general verdict of guilty where one of several counts is unsustained by any evidence; and to a premature sentence." (12 Cyc., 938.)
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> *Jackson v. U. S.,* 102 Fed. 239.

Defendant in error further contends that Count Three of the indictment in the case at bar was a good indictment under the Volstead Act on a charge of selling liquor in violation of Sections 3 and 29 of said Act. *(Farley v. U. S.,* 269 Fed. 721.) In the Farley case this Court said:

> "Nor was it necessary for the government to prove that the defendant was engaged in the business of a retail liquor dealer. It was enough to show that he sold liquor in any quantity."

It is urged by plaintiffs in error that the evidence was not sufficient to justify conviction on Count One of the indictment and that the verdict on Count One was inconsistent with the verdict on Counts Two and Four.

The questions involved here were all presented by counsel for defendants upon their Motion for Judgment Notwithstanding the Verdict, and for a New Trial in the Court below. In passing upon those motions, Judge Jennings said:

> "Charles Miller and John Engblad were indicted on five counts. Count one charges that on the 9th day of December they had in their possession in and on the premises known as the Alaskan Cafe, certain intoxicating liquor, to-wit, whiskey. Count 2 charges, that on said date and on said premises they did wilfully and unlawfully sell to Richard H. Gleason intoxicating liquor, to-wit, whiskey. Count 3 charges that on the said date and at the said place they did wilfully and unlawfully carry on the business of retail liquor dealers. Count 4 charges that on said date, and in and on said premises, they did wilfully and unlawfully sell to one James O'Brien intoxicating liquor, to-wit, whiskey. Count 5 charges that on said date, and at said place they did sell to one Richard H. Gleason intoxicating liquor, to-wit, whiskey, the said Gleason being then and there in the uniform of the United States Army. The evidence at the trial developed the fact that there was only one sale to Richard H. Gleason, and the Court thereupon compelled the presecutor to elect whether he relied upon Count 2 or Count 5. The District Attorney replied that he relied on Count 2, whereupon the Court dismissed Count No. 5.
>
> "The jury by their verdict found the defend-

ants guilty on Counts Nos. 1 and 3, and not guilty on Counts Nos. 2 and 4—that is to say, the jury found the defendants were guilty of having in their possession on the 9th of December, and in and on the premises known as the Alaskan Cafe, intoxicating liquors; and it also found them guilty of carrying on the business of retail liquor dealers in said premises and on said date without having first paid the special tax as required by law; and it found them not ugilty of having made the sales complained of to said Gleason or to said O'Brien.

"Counsel for defendants now moves for a judgment of dismissal of Count 3, and calls the attention of the Court to Farley v. U. S., 269 Fed 701 (1st page advance sheets under date of March 31, 1921), wherein the Court held that the Volstead Act repealed those sections of the R. S. U. S. which had to do with the collection of revenue from distilled spirits. Counsel for the Government, while not questioning the decision in the said Farley case, calls attention to the fact that the said decision went further than holding that the section of the R. S. U. S. in question was repealed by the Volstead Act, in that it laid down the proposition that if an offense was charged and proven under any other act a conviction could be sustained even though the indictment purported to be under some section of the R. S. U. S. which had been thus repeal by the Volstead Act, and so, his contention is, while the judgment of guilty on the third count of the indictment could not be sustained if considered only as relating to the said R. S.

U. S., still it could be sustained under the evidence in this case because, as he alleges, the evidence shows that the defendants were conducting or aiding in conducting, or associated with others in maintaining, a common public nuisance under section 19 of the Volstead Act.

"Section 19 of the Volstead Act is aimed at the declaring those places to be nuisances where alcoholic liquors are manufactured, stored, sold or vended * * * contrary to law. It is true the section further provides that

> " 'any person who shall maintain or shall aid or abet, or knowingly be associated with others in maintaining such common public nuisances, shall be guilty of a misdemeanor.'

"Nevertheless it is obvious that in order to charge a crime under that section, the indictment must allege, 1st, that the place was a common public nuisance; 2nd, that the defendants either maintained it, or aided or abetted, or were knowingly associated with others in the maintenance of such common public nuisance. In Count 3 of the indictment there is no charge that the defendants, or either of them, maintained the Alaskan Cafe, or aided or abetted, or were knowingly associated with others in maintaining that cafe,—only that they carried on the business of retail liquor dealers in and on those premises without a license.

"However, in the Farley case the Court said:

> " 'A cursory reading of the indictment in view of the prohibition act, leads to the conclusion that it is sufficient to charge a

sale of intoxicating liquor within the purview of section 3, title 2.'

"The report in the Farley case does not set forth the indictment, and it may be that in the indictment in that cast the defendants were charged with carrying on a retail liquor business, and instances given of the sale of liquor.

"While the third count of the indictment does not state the crime of maintaining a public nuisance, yet when it is considered that the 32nd section of the Volstead act provides that 'it shall not be necessary in any affidavit, information or indictment to give the name of the purchaser or * * *', and that the count in question charges that a crime was committed 'by then and there selling and offering for sale,' the count is sufficient to charge a sale, and if it be sufficient to chage any offense, then under the Farley case the requirement of the law is fulfilled. The verdict on that count would then be construed to be a verdict of guilty of selling intoxicating liquors. Counsel for the defendants insists that if that be the verdict of the jury it is contrary to their verdict finding the defendants not guilty of the offense charged in the 2nd and 4th counts—that is, of selling to Gleason and O'Brien; but how is the Court to choose between the two verdicts?

"Defendants also contend that they cannot be sentenced under Count 1 of the indictment. That count charges that on that day and at that place they had possession of whiskey. The verdict of not guilty as to the 2nd and 4th counts is a verdict to the effect that they did

not sell any whiskey on that day and at that place either to Gleason or O'Brien, but nevertheless, the jury found by their verdict that on that day and at that place they were in possession of whiskey. Counsel for the defendants contend that there is an inherent contradiction in these two verdicts—that the jury could not find the defendants guilty of having liquor in their possession if it found them not guilty of selling to Gleason and O'Brien, for the reason that the only evidence of any possession by the defendants is the evidence of Gleason and O'Brien as to the sale to them, and that by finding the defendants not guilty under Counts 2 and 4 the jury showed that they did not believe any of the evidence of the said Gleason and O'Brien; but this conclusion does not necessarily follow, for the jury might have believed some of Gleason and O'Brien's testimony and disbelieved the remainder. They might have believed that although the defendants had liquor in their possession, they did not sell it to Gleason and O'Brien.

"The motions for a new trial and an arrest of judgment will be denied, and the defendants sentenced under the verdict of the jury."

Counsel for plaintiffs in error direct attention to the fact that they demurred in the Court below to the indictment and urged that the demurrer be sustained as to Counts One, Two and Four for the reason that said Counts charged the selling of intoxicating liquor, which is particularly described as "whiskey containing more than one-half of one per

cent of alcohol by volume." That while the selling of commercial whiskey is prohibited under the Alaska Bone Dry Law it was not a crime to sell a beverage containing more than one-half of one per centum of alcohol by volume, unless it was shown that the beverage was intoxicating in fact. The words "containing more than one-half of one per centum of alcohol by volume" were surplusage in an indictment under the Alaska Bone Dry Law. As counsel states, that law provides that it shall be unlawful to possess intoxicating liquor. But in Section 1 of the Alaska Bone Dry Law we find the following definition:

> "Whenever the term 'liquor,' 'intoxicating liquor,' or 'intoxicating liquors' is used in this Act it shall be deemed to include whiskey, brandy, rum, gin, wine, ale, porter, beer, cordials, hard or fermented cider, alcoholic bitters, ethyl alcohol and all malt liquors including all alcoholic compounds classed by the United States Internal Revenue Bureau as compound liquors.' "

Under that provision of the Alaska Bone Dry Law it was only necessary for the Government to prove that the liquor possessed by the defendants was whiskey. When that was proved, as it was in this case (Tr. p. 11) the fact of its being intoxicating liquor was established, and it was unnecessary for the Government to show the per centum of alcohol contained in the liquor which came within the definition of intoxicating liquor under the Alaska Bone

Dry Law. As a matter of fact, however, the Government did prove by witnesses who were familiar with whiskey and the taste and intoxicating effects thereof, that the liquor possessed by defendants as charged in Count One of the indictment was in fact intoxicating. (Tr. p. 11, p. 17.)

> "(U. S. C. C. A. Ill. Opinion evidence of users of whiskey held admissible to prove that beverages contain more than one-half of 1 per cent of alcoholic content. *(Lewisohn v. U. S.,* unreported to date)."

We submit, for the reasons herein stated, that the judgment of the Court below should be affirmed as to Count One of the Indictment; and the cause as to Count Three be remanded for resentence on said Count Three in pursuance of the National Prohibition Act.

Respectfully submitted,

A. G. Shoup,

United States Attorney for Defendant in Error.